

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

E. FRANK CORNELIUS,

Plaintiff,

Case No. 11-13186

v.

Honorable Patrick J. Duggan

DYKEMA GOSSETT PLLC
RETIREMENT PLAN and its
ADMINISTRATOR, jointly and severally,

Defendants.

ORDER

In this *pro se* action, E. Frank Cornelius (“Plaintiff”) seeks to require the Dykema Gossett PLLC Retirement Plan and its administrator (collectively, “Defendants”) to use a different method of calculating his retirement income benefit. This matter is before the Court on Plaintiff’s objection to Magistrate Judge Michael Hluchaniuk’s order dated March 19, 2012, allowing Defendants to file a sur-reply brief.

The source of the present dispute is Plaintiff’s motion for leave to file a Second Amended Complaint. In support of this motion, Plaintiff filed a one-page brief citing *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962), for the proposition that leave to amend shall be freely given where justice so requires. The Court referred Plaintiff’s motion to Magistrate Judge Hluchaniuk. In response to the motion, Defendants argued that leave to amend should be denied because the seven new claims asserted by Plaintiff in the proposed Second Amended Complaint were futile. Plaintiff filed a reply brief in which

he asserted that leave to amend was not futile.

On March 13, 2012, Defendants filed a motion to strike Plaintiff's reply brief, or in the alternative, to allow Defendants to file a sur-reply brief. Defendants argued that the reply brief did not confine itself to addressing Defendants' arguments, and instead raised new arguments not found in Plaintiff's earlier brief. Defendants explained that because a sur-reply is generally not permitted, they lacked an opportunity to respond to Plaintiff's new arguments. The Court also referred this motion to Magistrate Judge Hluchaniuk. Because Defendants' motion was a non-dispositive motion, Plaintiff had fourteen days to respond. E.D. Mich. LR 7.1(e)(2)(B). On March 19, 2012, however, Magistrate Judge Hluchaniuk issued an order granting the motion in part. This order permitted a sur-reply, which Defendants filed on March 26, 2012.

Plaintiff objects to Magistrate Judge Hluchaniuk's order. He argues that Defendants' motion to strike or to file a sur-reply was misleading and that he should have been allowed to respond to it.

Where a party objects to a magistrate judge's nondispositive order, the Court sets aside the order if it is clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a). The Court does not believe that Magistrate Judge Hluchaniuk erred in allowing Defendants to file a sur-reply. Generally, an argument raised for the first time in a reply brief is waived, as the non-moving party would not have an opportunity to respond. *Scottsdale Ins. Co. v. Flowers*, 513 F.3d 546, 553 (6th Cir. 2008); *Lexicon, Inc. v. Safeco Ins. Co. of Am.*, 436 F.3d 662, 676 n.3 (6th Cir. 2006); *Sundberg v. Keller Ladder*, 189 F. Supp. 2d 671, 682-83 (E.D. Mich. 2002). It cannot be disputed that Plaintiff's one-page brief in support of his

motion failed to raise the arguments subsequently addressed in his reply. It is irrelevant that some of Plaintiff's arguments are based on his previous filings. Defendants cannot be expected to address in their response any and all contentions raised by Plaintiff's previous filings. Magistrate Judge Hluchaniuk's order generously allows Plaintiff's arguments to be considered in evaluating the motion to amend, rather than striking the reply. The Court believes that Magistrate Judge Hluchaniuk acted within his discretion in permitting Defendants to file a sur-reply to respond to these arguments. *See Eng'g & Mfg. Servs., LLC v. Ashton*, 387 F. App'x 575, 583 (6th Cir. 2010) (district court abused its discretion by denying leave to file a sur-reply where the movant presented new arguments and evidence in a reply brief).

In the event that the Court does not strike Defendants' sur-reply, Plaintiff has asked for the opportunity to file a rebuttal. The Court notes that Plaintiff's "objections" address the merits of the arguments raised in Defendants' sur-reply. Moreover, on April 18, 2012, Plaintiff filed a reply to Defendants' response to his objections. This reply also addresses the merits of the sur-reply's arguments. The Court believes that the briefs which have been filed are sufficient to evaluate the merits of Plaintiff's motion for leave to amend. For this reason, the Court shall not order further briefing of this matter.

Accordingly,

IT IS ORDERED that Plaintiff's objections to Magistrate Judge Hluchaniuk's order allowing Defendants to file a sur-reply are **REJECTED**.

s/PATRICK J. DUGGAN
UNITED STATES DISTRICT JUDGE

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